92-1733

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

GUSSIE MAE JACKSON, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF CHARLES JACKSON, JR. AND ON BEHALF OF SANDRA ANN GARDNER, FRANK EDWARD GARDNER and WILLIE GARDNER a/k/a WILLIE JACKSON,

Petitioners,

vs.

ZAPATA HAYNIE CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Consistent with the special solicitude historically extended to merchant seamen as "Wards of the Admiralty," should this Court recognize the duty of Jones Act (46 U.S.C. § 688) employers to offer water survival training to their seamen employees;

2. Whether, under the Jones Act (46 U.S.C. § 688), an employer's failure to provide water survival training contributed to the death of nine black seamen who drowned when forced to abandon ship;

3. Whether a maritime employer is duty bound to offer its seamen employees water survival training commensurate with that offered to its non-seamen employees.

LIST OF PARTIES

The following are parties who have a real or potential interest in the outcome of this case:

Zapata Haynie Corporation: Lawrence E. Abbott, John P. Napolitano, Jr., Steven K. Best, Deborah D. Kuchler, Abbott, Best & Meeks, Suite 200, 400 Lafayette Street, New Orleans, Louisiana 70130, Attorneys for Respondent; Natural Gas Pipeline Company of America, Donald R. Abaunza, S. Gene Fendler, David W. Leefe, Don K. Haycraft, Liskow & Lewis, 50th Floor, One Shell Square, New Orleans, Louisiana 70139-5001, Attorneys for Natural Gas Pipeline Company of America; Dennis M. Dylewski, John L. Verner, John Johnson, Calvin, Dyelewski, Gibbs, Maddock, Russell & Verner, Allied Bank Plaza, Suite 4500, 1000 Louisiana Street, Houston, Texas 77002-5012, Attorneys for Natural Gas Pipeline Company of America;

Michel P. Wilty, Robert B. Keaty, Keaty & Keaty, Attorneys at Law, Suite 104, One Lafayette Square, 345 Doucet Road, Lafayette, Louisiana 70503, Attorneys for Petitioners, Gussie Mae Jackson, Individually, and on behalf of the Estate of Charles Jackson, Jr., Sandra Ann Gardner, Frank Edward Gardner and Willie Gardner, a/k/a Willie Jackson.

Jerry McKernan, 7809 Jefferson Highway, The Settlement, Building G, Baton Rouge, Louisiana 70809, Attorney for Francis M. Gough;

Arthur C. Rutter, Jr., 415 St. Paul's Boulevard, Suite 720, Norfolk, Virginia 23510, Attorney for Mary Ann Ware, individually and as Administratrix of the Estate of John Thomas Ware; Roxie Ann Crawford, individually and as next-friend of Shayla Crawford and Jarud Crawford, minor children, and as Administratrix of the Estate of Bennie Lee Crawford; Arthur Allen Jackson; Willie Mae

Jackson, individually and as dependent mother of the decedent, John Franklin Jackson;

Ulysses Gene Thibodeaux, Clifford L. Newman, 1925 Enterprise Boulevard, Lake Charles, Louisiana 70601, Attorney for Billy McDougle, individually, and on behalf of the deceased, as the personal representative, and as administrator of the Succession of Tony Jerome McDougle;

Gano D. Lemoine, Jr., Gregory E. Tonore, Andrus, Boudreaux, Lemoine & Tonore, Post Office Box 3347, Lafayette, Louisiana 70502, Intervenors for attorneys' fees for claimant, Billy J. McDougle, individually and on behalf of the decedent, Tony J. McDougle;

Louis St. Martin, Post Office Box 3320, Houma, Louisiana 70361, Attorney for Georgia P. Thomas;

Nick Pizzolata, Jr., Post Office Box 1052, Lake Charles, Louisiana 70602, Attorney for Rosalie Bartie Vital, individually and on behalf of the decedent, John Otis Bartie, as the personal representative and as administratrix of his succession, Latia Clark, individually and as personal representative, and Sharon Eyvette Richard, on behalf of deceased and as tutrix of her minor son, Byron James Richard; Ivy Renee' Stawder, as personal representative for succession and beneficiaries of the decedent, Timothy Lee Thomas;

Larry A. Roach, 2917 Ryan Street, Lake Charles, Louisiana 70601, Attorney for Linda Gayle Benjamin, individually and as administratrix of the Estate of the decedent, Otis Ray Benjamin;

Drew Ranier, Post Office Box 74, Lake Charles, Louisiana 70602, Attorneys for Barbara Arthur, individually and on behalf of decedent, Francis Douglas Arthur, as the personal representative, and as administratrix of his succession, and Francis Douglas Arthur, Jr., and Angela Marie Arthur Daley;

Ms. Zandra Anderson, 1000 Louisiana Street, Suite 3200, Houston, Texas 77002, Attorney for Joe and Viola Benjamin;

G. Robert Friedman, 1300 Post Oak Boulevard, Suite 2100,, Houston, Texas 77056, Attorney for Francis McNeal Gough; Raleigh Newman, 435 10th Street, Lake Charles, Louisiana 70601, Attorney for Lillie Mae Willis, Individually, as surviving spouse, and as the sole heir and succession representative of James Edward Willis;

Eldon E. Fallon, 2800 Energy Centre, 1100 Poydras Street, New Orleans, Louisiana 70163, Attorney for Mary Ann Ware, individually and as administratrix of the Estate of John Thomas Ware; Roxie Ann Crawford, individually and as next friend of Shayla Crawford and Jarud Crawford, minor children, and as administratrix of the Estate of Bennie Lee Crawford; Arthur Allen Jackson; and Willie Mae Jackson, individually, as the dependent mother of the decedent, John Franklin Jackson;

Alvin E. Wiggins, Post Office Box 1289, Nederland, Texas 77626, Attorney for Linda Gayle Benjamin, individually and as administratrix of the Estate of decedent, Otis Ray Benjamin;

Ford J. Dieth, 335-337 Decatur Street, New Orleans, Louisiana 70130;

Jeffrey Breit, 100 Brooke Avenue, Norfolk, Virginia 23510, Attorney for the Estate of Robert Hill, Jr.;

J.B. Jones, Jr., Jerry G. Jones, Glenn W. Alexander, Jones, Jones & Alexander, Post Office Drawer M, Cameron, Louisiana 70631, Attorneys for Intervenor, Diane Arthur, Natural tutrix of the minor child, Thomas Douglas Arthur; and claimants Mary King-Hill, individually and as provisional administratrix of the succession of Robert Hill, Jr.; and Margaret Hebert Jackson, individually and as

administratrix of the succession of John Franklin Jackson, and as personal representative of the Estate of John Franklin Jackson, and as natural tutrix of the minor children, Victoria Marie Jackson and Gerald Jerome Jackson.

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No.

In the

Supreme Court of the United States

October Term, 1992

GUSSIE MAE JACKSON, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF CHARLES JACKSON, JR. AND ON BEHALF OF SANDRA ANN GARDNER, FRANK EDWARD GARDNER AND WILLIE GARDNER A/K/A WILLIE JACKSON,

Petitioners,

vs.

ZAPATA HAYNIE CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Gussie Mae Jackson, individually, for and on behalf of the Estate of Charles Jackson, Jr., and on behalf of Sandra Ann Gardner, Frank Edward Gardner and Willie Gardner, a/k/a Willie Jackson, hereby petition the Court to issue a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered on December 15, 1992.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 980 F.2d 257.

The ruling of the District Court is unreported. The case number in the Western District of Louisiana, Monroe Division, is 89-2307.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit was entered December 15, 1992. An Application for Rehearing was timely filed and subsequently denied on January 28, 1993. This Court has jurisdiction to review the decision of the Court of Appeals pursuant to 28 U.S.C. § 1254.

OPINIONS BELOW

The District Court had jurisdiction over the case pursuant to 46 U.S.C.A. § 181. The Court of Appeals had jurisdiction over the matter under 28 U.S.C. § 1291.

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant constitutional provisions are set forth in the Appendix. They include: U.S. Const. Art. III, Section 2 cl. 1, and U.S. Const. Art. VI, cl. 2.

STATEMENT OF THE CASE

On October 3, 1989 the F/V NORTHUMBERLAND, a 185-foot menhaden steamer owned by respondent, Zapata Haynie Corporation, struck and ruptured a submerged natural gas pipeline less than a mile offshore in the Gulf of Mexico near Sabine Pass, Texas.

Of the fourteen persons on board the vessel, two men perished in the ensuing explosion and fire, while *nine others, including Charles Jackson, drowned.* One of the survivors, vessel pilot Francis "Mac" Gough, recounted the scene in which Charles Jackson, the F/V NORTHUMBERLAND's cook, stood on the burning ship's deck screaming for help. Finally, as the flames approached, Charles Jackson abandoned ship and never surfaced.

Charles Jackson did not know how to swim and had not been offered water survival training.

Respondent, Zapata Haynie Corporation, subsequently filed a complaint for exoneration from and/or limitation of liability pursuant to the Limitation of Vessel Owner's Liability Act, 46 U.S.C.A. § 181 *et seq.* The pipeline owner, the crew members and the survivors of the deceased crew members ("the Jones Act claimants") filed claims and contested Zapata's right to limitation or exoneration. Following trial, the District Court found that the accident was caused solely by the negligence of Natural Gas Pipeline Company of North America, and that respondent was not at fault for either the accident or any of the resulting injuries or deaths.

On appeal to the United States Fifth Circuit Court of Appeals, the survivors of the deceased crew members who drowned asserted that respondent, Zapata Haynie Corporation, as a vessel owner and Jones Act employer, owed a duty to provide water survival training to its seamen crew members, the majority of which were non-swimmers. In affirming the District Court's judgment, the Fifth Circuit declined to "impose a general duty on vessel owners to teach crew members to swim or to require crew members to wear flotation devices at all times."

This fiery tragedy was foreshadowed over seven years earlier when Zapata's F/V MISSISSIPPI SOUND struck a submerged but

unburied high pressure natural gas pipeline. Although the flammable gas which escaped the pipeline ruptured by respondent's F/V MISSISSIPPI SOUND did not ignite, United States District Judge Adrian Duplantier, of the Eastern District of Louisiana underscored the glaring truth of the incident:

> It is fortunate that no bodily injury or death resulted from the allision.

See Southern Natural Gas Company v. Zapata Haynie Corp., C.A. No. 82-1777 (E.D. La. 1983) written reasons for judgment rendered by Judge Duplantier.

Moreover, prior to the October 3, 1989 disaster, Captain Wayne Gough, master of the F/V NORTHUMBERLAND, saved Charles Jackson's life when Mr. Jackson fell overboard from the F/V NORTHUMBERLAND. In this prior incident, Captain Gough dove into the water and assisted Charles Jackson to safety.

According to the trial testimony of Zapata's marine safety expert, Captain Douglas Halsey, a mariner who can't swim is exposed to a greater risk than one who can. Captain Halsey further concluded that non-swimmer Charles Jackson drowned because he was not wearing a flotation device. Upon the backdrop of the F/V MISSISSIPPI SOUND'S rupture of a natural gas pipeline some seven years earlier, respondent was placed on notice of the severity of the danger presented by submerged pipelines in the waters navigated by its menhaden steamers.

Although the Fifth Circuit declined to impose a general duty requiring vessel owners to teach crew members to swim, Captain Gough, who had once before rescued Charles Jackson from drowning, agreed that swimming lessons should be offered to respondent's crew members because the ability to swim could save a man's life.

REASONS FOR GRANTING THE WRIT

I.

CONSISTENT WITH THE SPECIAL SOLICITUDE HISTORICALLY EXTENDED TO MERCHANT SEAMEN AS "WARDS OF THE ADMIRALTY," THIS COURT SHOULD RECOGNIZE THE DUTY OF JONES ACT EMPLOYERS TO OFFER WATER SURVIVAL TRAINING TO THEIR SEAMEN EMPLOYEES.

During trial, the District Court received direct and uncontroverted evidence that many of the F/V NORTHUMBERLAND's crew members did not know how to swim. More particularly, Charles Jackson drowned on October 3, 1989 when he was forced by flames to jump from the F/V NORTHUMBERLAND into the Gulf of Mexico less than a mile from the beach near Sabine Pass, Texas.

Whether characterized as "water survival" or swimming skills, any semantic distinction is eclipsed by the admiralty's protection of the lives and safety of merchant seamen. As this Court recently echoed in *Miles v. Apex Marine Corporation*, 111 S. Ct. 317 (1990), historically, admiralty courts have zealously upheld their special solicitude for the welfare of seamen and their families.[1] Further, as articulated by the Fourth and Seventh Circuits, the central purpose of the Jones Act is "to provide protection to those subjected to risks associated with the transportation function of vessels on navigable waters."[2]

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1. *See Miles v. Apex Marine Corporation*, 111 S. Ct. 317 (1990) at p. 327.

2. *Johnson v. John F. Beasley Construction Company*, 742 F.2d 1054 (7th Cir. 1984); *Yoash v. McLean Contracting Company, Inc.*, 907 F.2d 1481 (4th Cir. 1990) at p. 1485.

In the case *sub judice,* the decision of the panel below, reported at 980 F.2d 257, represents a glaring departure from traditional principles of maritime law and the "central purpose" of the Jones Act. By declining to recognize a Jones Act employer's duty to offer water survival training to its seamen employees, the Fifth Circuit panel has, in effect, dismantled the Jones Act employer's duty of care which has long been recognized by the opinions of this Court and other Circuits.[3]

In contrast to the panel decision below, the Fifth Circuit in *Allen v. Seacoast Products, Inc.* recognized that a vessel captain owes his crew a broad paternalistic duty to protect them.[4] As further observed by the Fourth Circuit in *Harris v. Pennsylvania R.R. Company,* 50 F.2d 866 (4th Cir. 1931), a seamen has traditionally been entitled to "rescue" as it is implied in his employment contract that the ship will use *every* means to save the life of a human being who has no other source of help. A seaman's entitlement to "rescue" as expressed by the Fourth Circuit in *Harris* was more recently embraced by the Ninth Circuit in *Walsh v. Zuisei Kiaun K.K.*, 606 F.2d 259 (9th Cir. 1979). Thus, even where there is no negligence on respondent's part for the pipeline allision that created the need for the rescue, the vessel owner nonetheless owes a duty of rescue to the vessel crew members.[5] It stands to reason that a seamen trained in the fundamentals of water

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3. *Mahnich v. Southern Steamship Company,* 321 U.S. 96, 103, 64 S. Ct. 455, 459, 88 L. Ed. 561 (1944); *Dempsey v. Mac Towing, Inc.,* 876 F.2d 1538 (11th Cir. 1989) at p. 1542.

4. *Allen v. Seacoast Product, Inc.,* 623 F.2d 355 (5th Cir. 1980) at p. 362 citing *Offshore Company v. Robison,* 266 F.2d 769 (5th Cir. 1959); and *Vickers v. Tumey,* 290 F.2d 426 (5th Cir. 1961) at p. 429.

5. *Walsh v. Zuisei Kiaun K.K.,* 606 F. 2d 259 (9th Cir. 1979); citing *Harris v. Pennsylvania R.R. Company,* 50 F.2d 866 (4th Cir. 1931).

survival increases the probability of successful rescue, and simultaneously decreases the chances that a double drowning will take the life of a would-be rescuer.

The duty called for by the F/V NORTHUMBERLAND disaster embodies a legal issue which merits a uniform and pervasive rule. In order to insure uniform protection of merchant seamen, it is particularly appropriate that this Court recognize a Jones Act employer's duty to tender water survival training to vessel crew members.

II.

THE RESPONDENT JONES ACT EMPLOYER'S FAILURE TO OFFER WATER SURVIVAL TRAINING TO ITS CREW MEMBERS CONTRIBUTED TO THE DEATHS OF NINE BLACK SEAMEN WHO DROWNED WHEN FORCED TO ABANDON SHIP.

The District Court articulated the issue confronted as follows:

> Whether any negligence of Zapata Haynie Corporation contributed to the deaths of the various Jones Act claimants.

The conduct of the respondent Jones Act employer measured against an incomplete definition of "duty" necessarily instilled reversible error in the District Court's findings of fact. Had respondent provided water survival training to its vessel crew members, as were provided to its aircraft spotter pilots, the drowning deaths of Charles Jackson, *and eight other black seamen,* would likely have been prevented. The Court's recognition of this duty is appropriate in its application to the instant case, as well as beyond the facts of this disaster and the commercial fishing industry.

Thus, the Court should grant this writ application not only to correct the erroneous panel decision below as it applies to these applicants, but more importantly to prevent the profound dilution of time honored protections afforded merchant seamen by this Court. Moreover, inasmuch as the Fifth Circuit's instant decision substantially deviates from the charted course of uniform maritime authorities held among the Circuit Courts, this Honorable Court should additionally grant certiorari to resolve a conflict in the jurisprudence.

III.

A MARITIME EMPLOYER IS DUTY BOUND TO OFFER ITS SEAMEN EMPLOYEES WATER SURVIVAL TRAINING EQUAL TO OR GREATER THAN THAT OFFERED TO ITS NON-SEAMEN EMPLOYEES.

In *Allen v. Seacoast Products, Inc.*, 623 F.2d 355 (1988), Fifth Circuit Judge Brown described a menhaden operation:

> The *Louisiana* is a 165-foot seiner "mother" ship. It is specifically designed to net and store up to 1,100,000 pounds of Menhaden fish for transfer to Seacoast fish meal processing plants. Two 36-foot boats, normally carried on either side of the mother ship, are used to spread and control the seine nets. The *Louisiana* did not cast its nets randomly, however. It was rather one of a 26-ship Seacoast fishing "navy" *assisted by a virtual air force of spotter aircraft. Normally the navy lay offshore until the air force spotted schools of menhaden in the area.* The schools' locations would then be radioed to the navy,

> and any ship in its discretion could attack the schools.[6]

The tragic anomaly reflected by the respondent's company policies effectively offered a lesser measure of protection to respondent's employees who were most directly exposed to the perils of the sea. During trial, respondent's vessel captain, Wayne Gough, and expert mariner, Captain Douglas Halsey, acknowledged the grave risk confronted by non-swimmer "pogey" fishermen. Although, a seaman's exposure to the perils of the sea gives rise to the historical protections which flow to those who satisfy the criteria for seaman status, respondent, Zapata Haynie Corporation provided water survival training to its non-seaman aircraft pilot, but not to seamen, such as Charles Jackson, who were assigned to respondent's fleet of sixty-two menhaden steamers.

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6. *Allen v. SeaCoast Products, Inc.*, 623 F.2d 355 (5th Cir. 1988) at p. 358 (emphasis added).

CONCLUSION

The importance of granting certiorari in this case cannot be overstated. The misapplication of prior case law, both in the previous pronouncements of this Court and the lower federal courts, threatens to strangle the future viability of a seaman's protections historically championed by this Court. Such a dismal result need not occur if this Court will accept the responsibility of fashioning a substantive rule of maritime law which the Fifth Circuit erroneously declined to undertake. A uniform rule requiring more than mere minimal compliance with Coast Guard regulations and insuring the realization and enforcement of a maritime employer's duty to tender water survival training to vessel crew members is consistent with the legislative purpose underlying the adoption of the Jones Act and would further maritime commerce by providing a measure of certainty to the vessel masters and seamen who work in the maritime industry.

Accordingly, this Court should grant a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JANUARY 28, 1993

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-4432

ZAPATA HAYNIE CORPORATION,

Plaintiff-Appelle,

versus

FRANCIS ARTHUR, ET AL.,

Defendants,

MARK KING-HILL, Etc., MARGARET HEBERT JACKSON, Etc., and NATURAL GAS PIPELINE COMPANY OF AMERICA, ET AL.,

Defendants-Appellants.

Appeals from the United States District Court for the Western District of Louisiana

ON PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion December 15, 1992, 5 Cir., 198_, _____F.2d _____)

(January 28, 1993)

Appendix A

Before JOLLY and HIGGINBOTHAM, Circuit Judges and WILLIAMS,* District Judge.

PER CURIAM:

The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are DENIED.

* * * *

ENTERED FOR THE COURT;

s/ E. Grady Jolly
United States Circuit Judge

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THE MANDATE

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* District Judge of the Northern District of California sitting by designation.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED DECEMBER 15, 1992

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-4432

ZAPATA HAYNIE CORPORATION,

Plaintiff-Appellee,

versus

FRANCIS ARTHUR, ET AL.,

Defendants.

MARY KING-HILL, Etc., MARGARET HEBERT JACKSON, Etc., and NATURAL GAS PIPELINE COMPANY OF AMERICA, LILLIE MAE WILLIS, MRS. GUSSIE MAE JACKSON, Etc., LINDA BENJAMIN, Etc., FRANCIS McNEAL GOUGH, BILLIE McDOUGLE, Etc.

Defendants-Appellants.

Appeals from the United States District Court for the Western District of Louisiana

Before JOLLY and HIGGINBOTHAM, Circuit Judges, and WILLIAMS, District Judge:*

E. GRADY JOLLY, Circuit Judge:

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* District Judge of the Northern District of California, sitting by designation.

Appendix B

In this appeal, we review the district court's judgment exonerating Zapata Haynie Corporation from liability for injuries and damages resulting from the collision of its vessel, the F/V NORTHUMBERLAND, with a natural gas pipeline owned by Natural Gas Pipeline Company of America ("NGP"). We find no reversible error, and therefore AFFIRM the judgment of the district court.

I

Shortly before 6:00 p.m. on October 3, 1989, the F/V NORTHUMBERLAND, a menhaden fishing vessel owned and operated by Zapata, struck a submerged sixteen-inch-diameter natural gas pipeline owned by NGP. Although the pipeline was required to be buried three feet below the surface of the Gulf of Mexico, it had become partially exposed. Within seconds after striking the pipeline, the vessel was engulfed in flames. Of the fourteen persons on board at the time of the accident, eleven died (two in the explosion and fire, and nine by drowning).

Zapata filed a complaint for exoneration from and/or limitation of liability pursuant to the Limitation of Shipowners' Liability Act, 46 U.S.C. §§ 181, *et seq.* NGP, the crewmembers, and the survivors of the deceased crewmembers ("the Jones Act claimants") filed claims and contested Zapata's right to limitation or exoneration. Following a three-week trial, the district court found that the accident was caused solely by the negligence of NGP, and that Zapata was not at fault for either the accident or any of the resulting injuries or deaths. NGP has not appealed the finding that it was negligent.

Appendix B

II

A

NGP and the Jones Act claimants contend on appeal that the district court clearly erred in finding that Zapata was not negligent in causing the accident or the resulting injuries and deaths. NGP further contends that, because the district court made no reference to the legal standard it applied in determining whether Zapata was negligent in striking the pipeline, it must have applied the wrong standard. We disagree. When addressing the Jones Act claimants' arguments that Zapata had a duty to require the crewmembers to wear flotation devices at all times and/or to teach them to swim, the district court stated that Zapata "did not breach any duty which would subject it to liability under either routine negligence or Jones Act standards." Based on our review of the record and the district court's opinion, we are convinced that the district court applied the appropriate legal standards in determining all of the issues before it.

Under the Jones Act, Zapata "must bear the responsibility for any negligence, however slight, that played a part in producing the plaintiff[s'] injury." *In re Cooper/T. Smith*, 929 F.2d 1073, 1076-77 (5th Cir.), *cert. denied sub nom. Abshire v. Gnots-Reserve, Inc.*, ___ U.S. ___, 112 S. Ct. 190 (1991). The burden of proving causation under the Jones Act is "very light" or "featherweight." *Id.* at 1076. "Questions of negligence in admiralty cases are treated as factual issues, and are thus subject to the clearly erroneous standard." *Noritake Co., Inc. v. M/V Hellenic Champion*, 627 F.2d 724, 728 (5th Cir. 1980). A factual finding is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985) (citation omitted). "If the

district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." *Id.* at 573-74.

B

NGP contends that Zapata was negligent in failing to heed published warnings regarding the dangers of navigating near pipelines; failing to ensure that the master of the F/V NORTHUMBERLAND, Captain Gough, knew how to read a nautical chart, and used it for navigation; failing to equip the vessel with a fathometer; and failing to use caution in shallow water pipeline areas or to leave a margin of safety below its keels. It further contends that Zapata's assumption that all pipelines are always buried was negligent in the light of its knowledge of two prior collisions with exposed pipelines, Captain Gough's personal experience in pulling up a pipeline with his anchor, and the lack of any authoritative navigational aid advising mariners of the depth at which pipelines are buried.

(1)

NGP contends that Zapata negligently ignored Coast Guard publications warning of the higher level of care required of mariners navigating near pipelines. The district court found that there was no evidence that Captain Gough's failure to consult these publications caused or contributed to the accident. This finding is supported by the evidence and is not clearly erroneous.

Appendix B

(2)

NGP next contends that Zapata negligently failed to use nautical charts. The nautical chart of the area depicted the NGP pipeline, but did not indicate whether it was buried. The chart warns mariners to use caution "when anchoring, dragging or trawling" in pipeline areas. Captain Gough did not consult this chart before the collision, and there was evidence indicating that he did not know how to read and interpret the chart. However, the district court found that Captain Gough's failure to consult the chart was not a cause of the accident:

> Even had Captain Gough noted the location of the pipeline on the chart, or plotted it from the chart or Loran, he had no reason to believe that he could not safely navigate over it; he had fished the waters in the area for thirteen years five days a week, six months a year, and made thousands of sets without any problems. Nor would avoidance of the charted location have prevented this accident because the charted location of the pipeline was approximately [150] feet west of the actual location of the pipeline.

The record contains ample evidence to support these findings.

(3)

NGP maintains that Zapata was negligent in failing to equip

the F/V NORTHUMBERLAND with a fathometer, leaving Captain Gough with no way to determine the depth of the water other than by nudging the bottom and backing off. The record contains considerable evidence that Zapata's vessels frequently touch bottom while engaged in menhaden fishing operations. However, Captain Gough and the two other survivors all testified that the vessel was not touching bottom at the time of the collision. The district court found that all of Zapata's navigational equipment was in working order and met or exceeded Coast Guard requirements. It further found that there was no showing that a fathometer would have enabled the vessel to avoid this accident. Those findings are not clearly erroneous.

(4)

NGP introduced evidence that Zapata and Captain Gough routinely operated their ships at or below the mudline in shallow water. Because the menhaden fish often school close to the shore in six to twelve feet of water, and Zapata had a policy of "no fish, no pay," NGP asserts that economic pressures led the crews to pursue the fish into this shallow water despite the fact that the draft of the ships often exceeded the water depth. Nevertheless, the district court found that the F/V NORTHUMBERLAND was not operating below the mudline when the accident occurred. As we have previously stated, that finding is not clearly erroneous.

(5)

NGP cites the following as evidence that Zapata's reliance on the assumption that all pipelines are always buried was unreasonable: (1) in 1981, the Zapata ship MISSISSIPPI SOUND, operating in shallow waters, struck a gas pipeline that had become exposed; (2) Zapata was aware that in 1987, the menhaden ship SEA CHIEF struck a pipeline that had become exposed, and the

Appendix B

Coast Guard's investigation found a contributing cause to have been the ship's operation at or near the sea bottom; (3) earlier in 1989 prior to the collision, Captain Gough picked up another pipeline with the NORTHUMBERLAND's anchor in the Sabine Pass area and set it back down, without reporting the incident to the government or any pipeline company; and (4) Zapata's spotter pilot, who directed the NORTHUMBERLAND to a school of menhaden prior to the collision, knew that NGP's pipeline traversed that area, and knew that coastal erosion had occurred in the area. NGP contends that because Zapata and Captain Gough knew of these incidents, they had no legitimate basis for assuming that the pipelines were buried, especially since they did not even know the depth of such assumed burial.

The district court found that the incidents cited by NGP were not of a nature to put Zapata on notice that it should expect other pipelines to be unburied. Based on the evidence in this record, we cannot say that the district court's finding is clearly erroneous. Although we consider Zapata's assumption that all pipelines are always buried to be somewhat troubling in the light of its knowledge of these other incidents, we are mindful of Captain Gough's testimony that he had fished the waters in the area for thirteen years without any problems, and of the evidence that numerous other fishing vessels operated in the same area over the years without mishap.

C

NGP relies on our court's recent decision in *Pennzoil Producing Co. v. Offshore Express, Inc.*, 943 F. 2d 1465 (5th Cir. 1991) in support of its argument that Zapata must bear some responsibility for the accident. In that case, Offshore's vessel struck a natural gas pipeline 25 feet outside of the dredged channel

on a dark and foggy night. The district court found that the Offshore vessel's captain was negligent in proceeding up a canal in the fog, at a speed greater than was prudent under the circumstances, without using his spotlight or fathometer, and without posting a look-out in the bow. Offshore argued that the right to navigation was paramount, and that by allowing its pipeline to become an obstruction to navigation, United Gas should bear sole responsibility for the accident. Our court rejected that argument, and affirmed the district court's assessment of Offshore's fault at fifty percent, stating:

> It is certainly true that the right to navigate is paramount, and that those who place objects in, under, or over a waterway must do so in a way that does not interfere with navigation, including navigation outside a dredged channel. Offshore Express is incorrect, however, to assert that this right of navigation is wholly unfettered: when a mariner knows of obstructions to navigation, he must avoid them.

943 F.2d at 1470.

NGP contends that the district court's findings in this case and our court's holding in *Pennzoil* cannot both be correct, because the cases are indistinguishable. NGP's argument fails to apprehend our function as an appellate court. We do not sit as the trier of fact, and we cannot reverse a district court's findings simply because we might have viewed the evidence differently. The district court in *Pennzoil* found that the master of the Offshore Express vessel knew of the existence and location of the pipeline and was negligent in failing to use a fathometer and in running at an

imprudently high speed on a dark and foggy night. On appeal, our court held that those findings were not clearly erroneous. In this case, the district court found that Captain Gough was navigating the vessel in a prudent manner at the time of the accident, and that he had no reason to know that the NGP pipeline was not buried. Those findings are supported by the evidence and are not clearly erroneous. The difference in the results of this case and the *Pennzoil* case reflects nothing more than a proper application of the clearly erroneous standard of review.

D

The Jones Act claimants, relying on case law holding that maritime employers have a duty to instruct employees as to the proper use of life-saving devices, contend that Zapata was negligent in failing to either require its crewmembers to wear flotation devices at all times, or teach them to swim. They point out that Zapata knew that most of the crewmembers could not swim, and further note that the only non-swimmer who survived happened to be wearing a ski belt at the time of the accident. The other two survivors were both swimmers. The nine crewmembers who drowned were not wearing any flotation devices at the time of the collision.

The district court found that the NORTHUMBERLAND met or exceeded all Coast Guard requirements for safety training and equipment. Safety drills were conducted to teach emergency procedures, and crewmembers were instructed as to the use of safety equipment on board. Each crewmember had a personal flotation device, and additional flotation devices were located on deck and in the pilot house. Although Zapata required crewmembers to wear flotation devices while aboard the purse boats and while crossing back and forth between the purse boats and the steamer, it did not require them to wear flotation devices while on the steamer.

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Although the district court found that the nine crewmembers who drowned might have had an increased chance for survival if they had been wearing flotation devices at the time of the collision, it concluded that Zapata had no legal duty to require the crewmembers to wear flotation devices on board the steamer at the time of the accident. The district court pointed out that the vessel was in calm seas, under clear skies in daylight, and was not engaged in any dangerous maneuver at the time of the accident. It found that the crewmembers were unable to make use of the life jackets and other safety equipment on board because the vessel was engulfed in flames in three to five seconds, and there was not enough time for anyone to grab flotation devices before abandoning ship.

The district court's finding that Zapata took all reasonable precautions to safeguard the crew is not clearly erroneous. We decline to impose a general duty on vessel owners to teach crewmembers to swim or to require crewmembers to wear flotation devices at all times.

E

Because we hold that the district court did not clearly err in finding that Zapata was not at fault for the collision and resulting injuries, it is unnecessary to address the Jones Act claimants' contention that exoneration can be granted as to some claimants and denied as to others.

III

Our review of the record in its entirety convinces us that the district court's factual findings are not clearly erroneous. Accordingly, the judgment of the district court is

AFFIRMED.

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, LAKE CHARLES DIVISION FILED MAY 14, 1991

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

CIVIL ACTION
NO. 89-2307-LC

JUDGE WALTER
MAGISTRATE TRIMBLE

IN THE MATTER OF ZAPATA HAYNIE CORPORATION, AS OWNER OF THE F/V NORTHUMBERLAND, IN A CAUSE OF EXONERATION FROM, AND/OR LIMITATION OF LIABILITY

JUDGMENT

In accordance with the Opinion of the Court dated April 25, 1991,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of Zapata Haynie Corporation granting Zapata Haynie Corporation exoneration from liability under the Limitation of Liability Act, 46 U.S.C. § 181, *et seq.*

READ, RENDERED AND SIGNED this 13th day of May, 1991.

s/ Donald E. Walter
U.S. DISTRICT JUDGE

Appendix C

Judgment Entered: 5-14-91
by: Brenda Selliphall

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	Anderson	
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	Ranier	
	Jones	
	Fallon	

APPENDIX D — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, MONROE DIVISION FILED APRIL 26, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

CONSOLIDATED CASES
CIVIL ACTION NO. 89-2307
JUDGE WALTER

IN THE MATTER OF ZAPATA HAYNIE CORPORATION, AS OWNER OF THE F/V NORTHUMBERLAND IN A CAUSE OF EXONERATION FROM AND/OR LIMITATION OF LIABILITY

OPINION OF THE COURT

Background

This matter, arising from an accident involving the F/V Northumberland and a sixteen inch natural gas pipeline, was tried before this Court beginning on Monday, March 18, 1991. The trial concerned Zapata Haynie Corporation's petition for exoneration from or limitation of liability under the Limitation of Shipowner's Liability Act, and the liability of both Zapata Haynie Corporation and Natural Gas Pipeline Company of America.

The Limitation of Liability Act 46 U.S.C. § 181, et seq. allows vessel owners to be exonerated from liability, or to limit their liability to the value of the vessel after the accident, unless the accident was caused by fault attributable to the vessel owner.

The issues which must be addressed in this action are as

follows: 1. Whether any negligence of Zapata Haynie contributed to the deaths of the various Jones Act claimants, 2. Whether any negligence of Zapata Haynie was a cause of the accident, 3. Whether any negligence of NGP was a cause of the accident.

FINDINGS

Based on the testimonial and documentary evidence presented at trial, this court makes the following findings. On October 3, 1989, at approximately 5:50 p.m., the F/V Northumberland, owned and operated by Zapata Haynie Corporation (Zapata), was backing in about ten feet of water when its stern struck and ruptured a sixteen inch natural gas pipeline owned and operated by Natural Gas Pipeline Company of America (NGP). The vessel was backing at a slow speed at the time of the accident. Within three to five seconds the vessel was engulfed in flames. Eleven of the fourteen crewmen died in the accident, two in the explosion and fire, and nine by drowning.

The testimony of the three survivors was that the vessel was not touching bottom at the time of the accident or during the vessel's final set prior to the accident. No physical evidence that the vessel was not moving freely, or that it was on the bottom, was introduced. NGP's argument that the vessel must have been touching the bottom, based on the calculation of its draft from the approximate draft of a similar vessel (with assumptions made regarding the amount of weight it carried), is unconvincing. This Court finds that the vessel, although in water depths at or near its draft, was not touching the bottom.

The evidence shows that the vessel met or exceeded all Coast Guard requirements for both safety training and equipment. The vessel held safety drills to teach emergency procedures and

instructed the crew in the use of the safety equipment on board. Each man had his own personal flotation device, and there were additional life jackets and ski belts located on the upper deck of the vessel and in the pilot house. The men were required to wear ski belts or work vests while they were in the purse boats or while crossing back and forth between the purse boats and the steamer. They were not required to wear them while they were on the steamer.

Many of the crew members could not swim. One of the three survivors of the accident, Arthur Jackson, was a non-swimmer who happened to be wearing a ski belt and to be standing on the bow of the vessel at the time of the accident. The other two survivors, both swimmers, were in the pilot house at the time of the accident. No one on the stern of the vessel survived.

The nine members of the crew who drowned might have had an increased chance for survival if they had been wearing flotation devices of some kind at the time of the accident. However, this court concludes that Zapata Haynie had no legal duty to require its crew to wear ski belts or work vests on board the steamer at the time of this accident. The vessel was not engaged in any dangerous maneuver at the time of the accident. It was in calm seas, clear skies, and daylight. There is no evidence showing that any of the crew were knocked overboard by the impact with the pipeline. The crew was unable to make use of the life jackets and other safety equipment for one reason alone: the vessel was engulfed in flames in only three to five seconds. There simply was not time for anyone to even grab a ski belt as he abandoned ship.

This court cannot impose a general duty on the vessel owner to require its crew to wear flotation devices at all times when the ship is underway. To do so would be unreasonable because the

likelihood of falling overboard under routine circumstances is small, and, unless the vessel explodes or sinks instantaneously, there will almost certainly be time for the crew members to retrieve their life jackets before intentionally abandoning ship. In addition, space on board vessels is limited, particularly in passageways, and wearing a flotation device at all times would be inconvenient for routine work below decks. The inconvenience and doubtful benefit of such a requirement would also make it difficult to enforce. While there are situations in which crew members should be required to wear life jackets: on solo night watch, in rough seas, during dangerous maneuvers, or in other situations in which it is foreseeable that the likelihood of falling overboard is increased or the likelihood of a quick rescue is reduced, this court holds that the situation which led to this tragic accident is not one of those situations.[1] The ship had a railing around the deck to prevent crewmen from going overboard; Zapata stressed avoidance of going into the water as its primary safety goal; it instructed its crew in the use of the purse boats as lifeboats, and in the use of ring buoys for man overboard situations; the crew were required to wear ski belts or work vests in the purse boats because of the increased possibility of falling overboard. In short, Zapata took all reasonable precautions to safeguard the crew, to train them first of all to avoid going into the water, and finally to train them in proper

---

1. All of the cases cited by NGP and various wrongful death claimants which imposed a duty on the vessel owner to require the wearing of a life jacket involve such situations. *Davis v. Parkhill-Goodloe Company*, 302 F.2d 489 (5th Cir. 1962), (inexperienced "farm boy" crossing narrow planking over water); *Grantham v. Quinn Menhaden Fisheries, Inc.* 344 F.2d 590 (4th Cir. 1965), (no lifesaving instructions given, inadequate equipment, crewmen allowed to jump in the water intentionally to swim); *Deal v. A.P. Bell Fish Co.*, 674 F.2d 438 (5th Cir. 1982), (solo night watch, inexperienced deck hand, no bathroom facilities on board vessel); *Hebert v. Otto Candies, Inc.*, 402 F. Supp. 503 (E.D.La. 1975), (hazardous situation, increased risk of falling).

procedures if a crew member did go overboard. Because Zapata had no duty to require the wearing of flotation devices under these circumstances, it did not breach any duty which would subject it to liability under either routine negligence or Jones Act standards.

Zapata did not have a duty to foresee the vessel's striking a pipeline which was supposed to be buried to a depth sufficient to pose no hazard to navigation. *See Peoples Natural Gas Co. v. Ashland Oil, Inc.*, 604 F. Supp. 1517 (W.D. Pa. 1985).[2] The other accidents cited by NGP involving vessels and pipelines were not of a nature to put Zapata on notice that it should expect other pipelines to be unburied.

The navigational equipment (charts, Loran, etc.) met or exceeded Coast Guard requirements. All equipment aboard the vessel was in working order. There was no showing that any additional equipment, and in particular a fathometer, would have enabled the vessel to avoid this accident. There was no evidence that the absence of a copy of the *Coast Pilot #5* on board the vessel in any way contributed to the accident. Nor was any failure on the part of Captain Gough, the Northumberland's captain, to use Loran or navigational charts a cause of the accident. *See Peoples Natural Gas Co., supra* at p. 1527. Even had Captain Gough noted the location of the pipeline on the chart, or plotted it from the chart on Loran, he had no reason to believe that he could not safely navigate over it; he had fished the waters in the area for thirteen years, five days a week, six months a year, and made thousands of sets without any problems. Nor would avoidance of the charted location have

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2. *See also In the Matter of Tidewater Marine Towing, Inc. v. Curran-Houston, Inc.*, Civil Action No. 80-713 (E.D. La. October 6, 1983); *Ranger Insurance Company, et al v. Exxon Pipeline, et al*, Civil Action No. 88-0944 (W.D. La. July 2, 1990).

prevented this accident because the charted location of the pipeline was approximately one hundred and fifty feet west of the actual location of the pipeline.

Zapata Hynie had adequate procedures for the hiring of qualified persons to serve as captains aboard their vessels. Zapata required that its captains hold valid Coast Guard licenses, and looked at their safety records and overall employment record before hiring them. Captain Gough held a valid Coast Guard Master's license, had thirteen years experience fishing in the area (eight of them as a Captain), and had worked his way up in the company over several years to achieve his captain's position. He had never been cited for any sort of safety violation. Zapata was reasonable in its decision to hire Captain Gough.

Even if Captain Gough had not been qualified to serve as a steamer captain, none of his actions were a cause of this accident. He was navigating the vessel in a prudent manner at the time of the accident. The vessel was outside the one-half mile limit off the coast of Texas in an area commonly fished by shallow water fishermen of all types, including other Menhaden fishermen and shrimpers, and was engaged in normal fishing operations. The vessel was not touching bottom. In short, no negligence of Captain Gough in any way contributed to this accident.

Although the F/V Northumberland had a deeper draft than some of the vessels in use in the Menhaden industry, it was not unsuited to the operation of shallow water fishing. In fact, since the evidence shows that the vessel was not touching bottom at the time of the accident, the shape of the Northumberland's hull is irrelevant.

The High Island 71 pipeline, the subject of this action, which

according to the Corps of Engineers permit was required to be buried to a depth of at least three feet below the seabed, was exposed above the surface of the seabed (in places for more than one-half its diameter) and had been so exposed for at least eighteen months to two years and probably for much longer. There was extensive marine growth on the pipeline which had reached a point of such stability that it must have been present for a minimum of eighteen months and could easily have been present for ten years or longer. At very low tides, the pipeline was clearly visible above the surface of the water for a considerable distance near the shoreline.

The pipeline was allowed to be placed in the navigable waters of the Gulf pursuant to the permit from the Corps of Engineers. The permit required that the pipeline be maintained in accordance with the approved plans. The maintenance requirement is unambiguous. Therefore, NGP had a duty to maintain the pipeline at a minimum of three feet below the sea bed. NGP's inspection procedures were inadequate. Its "maintenance specialists" (inspectors) had no idea of how to spot shoreline erosion. From 1973 to 1989, the shoreline at the accident site eroded approximately four hundred and ninety feet without the detection of such erosion by NGP.

Although all of the inspectors saw the Sea Rim valve, which is in close proximity to the High Island 71 pipeline, well out in the water, a valve which it should have been obvious had originally been placed on land, none of them even suspected that the presence of the valve in the water signaled erosion or should cause them concern as to the condition of the High Island 71 pipeline. They simply were not trained to recognize the warning signs.

No probes of the pipeline were ever made, despite the fact that NGP had had to rebury other pipelines installed at about the same

time and knew of coastal erosion both to the West and to the East of the High Island 71. No effort was made to schedule inspections at low tide so that problems which might be hidden at other times could be seen. This court finds that NGP's inspection training and procedures were inadequate and that a reasonable inspection would have detected the problem with the High Island 71 pipeline.

NGP's theory that the pipeline was pulled up over the years by ship anchors is unconvincing. This Court finds no evidence that ship anchors contacted the pipeline, and specifically finds no evidence that the F/V Northumberland nor any other Zapata vessel was in any way responsible for the exposure of the pipeline.

NGP had a duty to maintain its pipeline at a minimum of three feet below the sea bed. It breached that duty by allowing the pipeline to become unburied and by failing to discover the unburied condition of the pipeline within a reasonable period of time. If the pipeline had been where it was supposed to be, this accident could not have occurred. If NGP's inspection training and procedures had been adequate, the unburied condition of the pipeline would have been discovered long before the time of this accident, and the accident would not have occurred.

CONCLUSION

Therefore, based on the foregoing, this Court finds that the accident at issue was caused solely by the negligence of NGP. Zapata Haynie was in no way at fault for either the accident itself or for any of the resulting injuries. NGP was 100% at fault for the accident. Zapata's motion for exoneration is GRANTED. Judgment in accordance with this decision will be signed upon presentation approved as to form. THUS DONE AND SIGNED this 25 day of April, 1991.

Appendix D

s/ Donald E. Walter
DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

COPY SENT:
DATE: 4-26-91
BY: D.D.
TO: All Counsel of Record

SUPREME COURT, U.S.
FILED
MAY 27 1993
OFFICE OF THE CLERK

No. 92-1733

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

GUSSIE MAE JACKSON, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF CHARLES JACKSON, JR. AND ON BEHALF OF SANDRA ANN GARDNER, FRANK EDWARD GARDNER and WILLIE GARDNER a/k/a WILLIE JACKSON,

Petitioners,

vs.

ZAPATA HAYNIE CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether there are "special and important reasons" for this Honorable Court to grant Petitioners' petition for a writ of certiorari where:

   a. There is no conflict between the decision of the United States Fifth Circuit Court of Appeals with the decision of any other United States court of appeals nor with the decision of any state court of last resort;

   b. The decision of the United States Fifth Circuit Court of Appeals did not depart from the accepted and usual course of judicial proceedings;

   c. The decision of the United States Fifth Circuit Court of Appeals does not address an "important question of federal law" which should be settled by this Honorable Court; and

   d. The decision of the United States Fifth Circuit Court of Appeals did not decide a federal question

in a way that conflicts with applicable decisions of this Honorable Court.

2. Whether this Honorable Court should impose a general duty on vessel owners to teach crew members to swim or to require crew members to wear flotation devices at all times, even when the circumstances which would force crew members to abandon ship are highly unforeseeable and where the vessel owner has taken all reasonable precautions to safeguard the crew.

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---

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No. 92-1733

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

GUSSIE MAE JACKSON, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF CHARLES JACKSON, JR. AND ON BEHALF OF SANDRA ANN GARDNER, FRANK EDWARD GARDNER and WILLIE GARDNER a/k/a WILLIE JACKSON,

Petitioners,

vs.

ZAPATA HAYNIE CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Zapata Haynie Corporation ("Zapata") submits this Brief in opposition to the petition requesting issuance of a

Writ of Certiorari to review the Judgment and Opinion of the United States Fifth Circuit Court of Appeals entered on December 15, 1992.

OPINIONS AND JUDGMENTS BELOW

The unreported opinion of the United States District Court for the Western District of Louisiana, Monroe Division, was entered in Civil Action No. 89-2307 on April 26, 1991. (Appendix C of Petition for Writ of Certiorari.) In that opinion, the Honorable Donald E. Walter held that Zapata "was in no way at fault for either the accident itself or for any of the resulting injuries." Zapata was, therefore, exonerated from all liability in connection with the October 3, 1989 casualty.

The district court's ruling was affirmed in *Zapata Haynie Corp. v. Arthur*, 980 F.2d 287 (5th Cir. 1992). In upholding the lower court's judgment, the United States Court of Appeals for the Fifth Circuit "decline[d] to impose a general duty on vessel owners to teach crew members to swim or to require crew members to wear flotation devices at all

times."[3] The appellate court found no clear error in the trial court's conclusion that Zapata "took all reasonable precautions to safeguard the crew."[4]

STATEMENT OF JURISDICTION

Zapata adopts the Statement of Jurisdiction set forth by Petitioners.

Jurisdiction in the district court was premised on the federal court's jurisdiction of admiralty and maritime claims, 28 U.S.C. § 1333, as well as upon the provisions of the Limitation of Shipowners' Liability Act, 46 U.S.C. § 181, *et seq.*, and the Extension of Admiralty and Maritime Jurisdiction Act, 46 U.S.C. § 740.

This is an appeal from a final judgment rendered by the district court in favor of Respondent, Zapata. The United States Court of Appeals for the Fifth Circuit had jurisdiction under the provisions of 28 U.S.C. § 1291.

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3. *Zapata Haynie Corp. v. Arthur*, 980 F.2d 287, 292 (5th Cir. 1992).

4. *Id.*

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

Zapata instituted the proceedings below pursuant to the Limitation of Vessel Owner's Liability Act, 46 U.S.C. § 181, *et seq.*, which is set out verbatim in Appendix A hereto. The limitation proceeding was consolidated with Zapata's claim against Natural Gas Pipeline Company of America ("NGP") based on general maritime law.

Petitioners argue for an expansion of ship owner duties pursuant to the Jones Act, 46 U.S.C. § 688, which is set out verbatim in Appendix B hereto.

STATEMENT OF THE CASE

On October 3, 1989, at approximately 5:50 p.m. the menhaden steamer F/V NORTHUMBERLAND, owned and operated by Zapata, was routinely backing following its conduct of an ordinary, uneventful fishing set in approximately ten feet of water when the vessel struck and ruptured an unmarked, unburied 16" diameter natural gas transmission pipeline owned and operated by NGP. Within

seconds the entire vessel was engulfed in flames. There was not enough time for the crew members to make use of lifesaving and/or water survival equipment due to the rapid ignition and spread of the fireball. Eleven of the fourteen crew members, including Charles Jackson, died in this holocaust which immediately consumed the vessel.

Zapata's man overboard and lifesaving procedures exceeded Coast Guard requirements. Life preservers were issued to each member of the crew, including reflective material and a locator light. Each crew member could determine where his life preserver was to be kept and most, if not all, of the crew members chose to store their life preservers near their bunks. Four additional life preservers were stowed on deck as well as two extra water skiing flotation belts kept in the pilot house. Ski belts were issued to those crew members who worked in the purseboats and were required to be worn when disembarking the steamer onto the purseboats, during fishing operations in the purseboats, and when reboarding the steamer at the conclusion of the set. In this regard, Zapata exceeded the practice of the industry as

other menhaden companies did not require their fishermen to wear ski belts while working in the purse boats. There was no prohibition issued by Zapata to prohibit the crew members from continuing to wear ski belts or life jackets upon boarding the steamer after a fishing set had been completed.

There was ample testimony during the trial of this matter that the crew members of the F/V NORTHUMBERLAND were adequately trained in the use of life preservers. Emergency action drills were conducted three times during the 1989 season consisting of assembling all crew members wearing life preservers, identification and demonstration of emergency equipment and other procedures to be followed in an abandon ship situation.[5]

The magnitude of the casualty and the instantaneous nature of the fireball rendered personal flotation devices essentially useless. The explosion erupted at the stern sending a wall of flames sweeping forward across the vessel

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5. Petitioners state Zapata provided water survival training to nonseaman aircraft pilots but not to fishermen. In fact, Zapata offered survival instruction to assist pilots in responding to a plane crash -- Zapata did not provide basic "swimming lessons" to those pilots.

through the wheelhouse and over the bow where most of the crew members were working. None of the life preservers stowed on deck were used. Even the two ski belts in the wheelhouse (near the bow) located within just a few feet of where the captain and pilot were working at the time of the explosion were not utilized due to the immediacy of the situation.

The record in the trial court was devoid of evidence concerning the physical condition or circumstances of most of the crew members who drowned following the F/V NORTHUMBERLAND's explosion. There was absolutely no evidence from which to conclude that most of the crew members would have survived even if they had been wearing life preservers at the time they entered the water, or had received instructions in swimming. For example, some of the crew members may have been literally blown off the vessel by the explosion and rendered unconscious. Thus, although the autopsy reports indicated drowning as the cause of death, neither a life preserver nor the ability to swim would have prevented their drowning. Additionally, the drowning could

have been the result of a concussion or other traumatic injuries sustained by these crew members before entering the water. The drowning would have resulted, in that event, regardless of whether or not they were wearing a personal flotation device or had known how to swim.

Specifically with reference to Charles Jackson, the autopsy report indicated he sustained flash burns over the front and back of his body probably incurred before he abandoned ship as he was exposed to the intense heat generated by the wall of flames engulfing the vessel. The pathologist who performed the autopsy noted "[t]he superficial body skin was denuded over the front and back, representing approximately 90 percent loss."[6]

Thus, the only evidence in the record regarding the physical condition of Charles Jackson indicated it was unlikely a personal flotation device or the ability to swim would have changed the outcome of that fateful day as the

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6. Postmortem Examination Report of S.M. LeBer, M.D., set out verbatim in Appendix C hereto.

first rescue helicopter did not arrive on the scene for approximately twenty minutes.

On page 4 of their Petition for Writ of Certiorari, Petitioners purport to cite the testimony of Zapata's marine safety expert, Douglas Halsey, for two propositions, i.e., a mariner who cannot swim is exposed to greater risk than one who can and that Jackson drowned because he was not wearing a flotation device. In fact, Halsey did not address the cause of Jackson's death by drowning and explained that, depending on the circumstances, the ability to swim does not necessarily save a seaman forced to abandon ship:

> Q. Do you think, as a mariner, that a person who goes to sea in the menhaden industry, and is not able to swim, is he exposed to any additional risks for loss of life as opposed to those who can swim?
>
> A. I guess the potential may be greater. But I don't know how much greater. The Coast Guard typically assumes that most people can't swim. When we respond to a casualty we expect to have to be able to assist everyone.
>
> Q. But you do recognize, as you said, that the nonswimmer, insofar as loss of life has a greater potential, greater risk than a swimmer does, isn't that kind of obvious, isn't it?

A. Possibly, yes.

Q. Well, do you agree that it is or does not?

A. It depends where you are. If you're in frigid waters, it doesn't make a hill of beans if you can swim or can't, you're going to die. In some areas close inshore in temperate weather, a swimmer may stand a better chance.

Q. Sure. Now if you are given the proposition that it was common knowledge at the time of this accident, if you give that as a true proposition, it was common knowledge at the time of this accident that a great many of the fishermen in the menhaden industry did now know how to swim, don't you think that there should be, that that proposition that a great number of menhaden fishermen did not know how to swim should be addressed in some particular manner by this employer?

A. Not necessarily, no.

Q. Well, you say not necessarily. Should they do something at all, anything at all?

A. Well, I don't know what they could do. I think that the information contained in Zapata's Operations Manual and Safety Procedures are adequate. Certainly, the utilization of flotation devices at these particular time frames during the course of their routine procedures is adequate. I think that generally in the marine industry, whether it's menhaden fishermen or other parts of the marine industry, a lot of people can't swim. I don't and you have a danger of falling overboard. I don't know how to correct that, but I would not suggest that you

> undertake the task of teaching them to swim
> to make them wear a P.F.D. all the time.

Moreover, in addition to the intense heat encountered by the crew members before abandoning the vessel, the crew was also exposed to turbulent conditions in the water. Heat radiating from the burning vessel forced those in the water to repeatedly submerge their heads to escape the rising temperatures. Natural gas rolling up to the surface from the ruptured pipeline made the water like a boiling cauldron around the vessel and fire erupted on the surface of the water itself. This was no ordinary man overboard situation.

Expert testimony elicited at trial established that **neither the Navy nor the Merchant Marine requires its crew members to know how to swim nor is there any requirement for crew members to wear life jackets while in protected areas such as the deck of the vessel**. Furthermore, there are no rules, regulations, or statutes, including any Coast Guard regulations, which would have required any of the crew members of the F/V NORTHUMBERLAND to wear life preservers while working on the deck of the vessel. The procedures used aboard the

F/V NORTHUMBERLAND were likened to those used in the inland towing industry, a shallow draft operation similar to that being conducted by the F/V NORTHUMBERLAND. The inland towing industry requires all personnel to wear work vests when boarding, disembarking, riding in skiffs or when in the tow. The crew members are not required to wear work vests on the main deck of the towing vessel. A similar procedure was followed on the F/V NORTHUMBERLAND. The crew was required to wear ski belts when working in the purse boats. This provided protection for them when disembarking the steamer onto the purse boats, during fishing operations in the purse boats, and when reboarding the steamer at the conclusion of the fishing set.

The trial court record also indicates the Coast Guard specifically considered requiring the wearing of personal flotation devices and rejected the idea as infeasible. Due to limited space aboard vessels, it is not practical to wear a personal flotation device while on the steamer. Those devices would interfere with the crew members' normal transit on board the vessel. For example, the port to starboard

passageway immediately forward of fish holds on most menhaden steamers is so narrow that passage while wearing a personal flotation device would be extremely difficult.

Additionally, as an uninspected fishing vessel the F/V NORTHUMBERLAND was not required to, but did, in fact, have a steel bulwark surrounding the entire perimeter of the main deck. Specifically in the bow area of the vessel, where some of the crew members were located at the time of the explosion, the bulwark was chest high. Under most circumstances that bulwark would have provided more than adequate protection for the crew.

The evidence also indicated that this steamer served as home for the fishermen five days a week during the fishing season. To require crew members to wear personal flotation devices on the deck of the steamer at all times would have imposed a nearly impossible standard to enforce under those circumstances.

The crew members of the F/V NORTHUMBERLAND were aboard a stable 160 foot steamer surrounded by steel bulwarks in calm waters and would not have been confronted

with a hazard such as being thrown or falling overboard were it not for the highly unforeseeable allision with the exposed pipeline.

The crew of the F/V NORTHUMBERLAND was experienced in menhaden fishing and were adequately equipped to handle normal hazards encountered. However, no one could have been expected to anticipate the unburied, exposed pipeline which lurked beneath the waters off the Coast of Texas and which caused the explosion and immediate fire aboard the vessel.

Under the paramount right of navigation, the fishing industry had the right to expect NGP's pipeline to be buried. There was no reason for the master or crew of the F/V NORTHUMBERLAND or for Zapata's management to foresee an explosion and fire aboard the vessel which would have denied the crew time and opportunity to don ski belts, work vests or life preservers.

The unburied pipeline set the stage for the ensuing tragedy and created circumstances so horrific that neither personal flotation devices nor the ability to swim could have

overcome. Under these extraordinary circumstances, both the district court and the appellate court correctly concluded that the sole fault for the allision and resulting injuries and deaths rested with NGP whose pipeline had been exposed above the seabed for ten years in violation of its Corps of Engineers permit.[7]

SUMMARY OF ARGUMENT

1. The trial court's findings were based upon factual circumstances unique to the case *sub judice* and upon a correct application of the law. There are no "special and important reasons" justifying the issuance of a writ of certiorari.[8]

2. Neither the general maritime law nor the Jones Act[9] impose a general duty on vessel owners to teach crew members to swim or to require crew members to wear flotation devices at all times. Imposition of such a duty is

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7. NGP has not petitioned this Honorable Court for a Writ of Certiorari to review the finding that it was 100% at fault in causing the accident and resulting injuries and deaths.

8. Supreme Court Rule 10.

9. 46 U.S.C. § 688.

completely unwarranted in this factual situation where the circumstances which forced crew members to abandon ship were highly unforeseeable and where the vessel owner had taken all reasonable precautions to safeguard the crew.

ARGUMENT

I.

There are no "Special and Important Reasons" to Grant the Petition for Writ of Certiorari.

Petitioners attempt to create a conflict among the appellate circuits where there is none. Citing cases from the Fourth[10] and Ninth[11] Circuits for the proposition that a vessel owner owes a duty of rescue to its crew, Petitioners imply the Fifth Circuit has somehow abrogated the rescue doctrine in declining to impose a duty on vessel owners to teach crew members to swim or to require crew members to wear flotation devices at all times. The rescue doctrine is alive and well in the Fifth Circuit and was not affected in any way by the Court's ruling below.

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10. *Harris v. Pennsylvania R.R. Co.*, 50 F.2d 866 (4th Cir. 1931).
11. *Walsh v. Zuisei Kiaun K.K.*, 606 F.2d 259 (9th Cir. 1979).

The duty owed by a vessel owner under the maritime rescue doctrine was defined by the Fifth Circuit in *Reyes v. Vantage S.S. Co., Inc.*[12] Relying in part on the very same Fourth Circuit decision cited by Petitioners,[13] the Fifth Circuit agreed there was an affirmative "duty upon the ship to use every reasonable means to retrieve the seaman from the water."[14] However, as the Court noted, **the duty to rescue does not arise until the seaman enters the water** by jumping or falling overboard.[15]

Thus, the rescue doctrine does not encompass a duty on the ship to provide water survival training in advance of the man-overboard crisis. None of the reported decisions applying the maritime rescue doctrine have even hinted at such a duty.

Petitioners argue a writ of certiorari should be granted to "insure uniform protection of merchant seamen,"[16] to

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12. 609 F.2d 140 (5th Cir. 1980).
13. *Harris v. Pennsylvania R.R. Co.*, 50 F.2d 866 (4th Cir. 1931).
14. 609 F.2d at 142.
15. *Id.*
16. Petition for Writ of Certiorari at p. 7.

resolve a purported "conflict in the jurisprudence,[17] and to correct a perceived substantial deviation by the Fifth Circuit from "uniform maritime authorities held among the Circuit Courts."[18] Yet, Petitioners have not cited a single case from any circuit in which a general duty was imposed upon a vessel owner to provide water survival training or to require the use of flotation devices at all times. Thus, there is no conflict among the circuits -- none have recognized the duty advocated by Petitioners.

Petitioners are, in effect, attempting to cloak their argument with a nonexistent conflict among the circuits to elevate the issues to a "special and important"[19] plane to justify issuance of a writ of certiorari when, in fact, both the trial and appellate courts' rulings relied heavily on factual findings unique to the extraordinary circumstances occasioned by the October 3, 1989 casualty. Both the trial and appellate courts' conclusions were based on the very

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17. *Id.* at p. 8.
18. *Id.*
19. Supreme Court Rule 10.

"time honored protections afforded merchant seamen by this Court"[20] Petitioners claim were abrogated.

As the Fifth Circuit applied generally recognized principles of law which in no way resulted in any conflict among the circuits, this case does not merit review on writ of certiorari.

II.

Neither the General Maritime Law nor the Jones Act Impose a General Duty on Vessel Owners to Teach Crew Members to Swim or to Require Crew Members to Wear Flotation Devices at all Times.

Petitioners cite no authority whatsoever to support their argument for imposition of an all-encompassing duty on ship owners to teach crew members to swim or to require the use of flotation devices at all times. There simply is no such duty. **Neither the United States Navy nor the Merchant Marine requires all crew members to learn to swim.** It is not the practice in the fishing industry to provide water survival training. And neither the jurisprudence nor

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20. Petition for Writ of Certiorari at p. 8.

statutory law mandates such a course of action by ship owners. As the Court explained in *Davis v. Parkhill-Goodloe Company*:[21]

> [T]he capacity to swim is a safeguard only so long as the unpredictable occurrence does not render the victim incapable of swimming, or this capability is inadequate to overcome the violent forces at work.[22]

Likewise, there is no jurisprudential or statutory mandate requiring crew members to wear flotation devices at all times. There are cases in which, under specific facts, the court concluded the seaman should have been wearing a life preserver. However, those cases are clearly factually distinguishable from the circumstances arising out of the explosion of the F/V NORTHUMBERLAND.

In *Noble v. Moore-McCormack Lines*,[23] the court faced a factual situation remarkably similar to that presented in the instant case. There, the fishing trawler CORINTHIAN was fishing with a crew of eleven fishermen when another vessel

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21. 302 F.2d 489 (5th Cir. 1962).

22. *Id.* at 493.

23. 96 F.Supp. 369 (D.Mass. 1951).

emerged through the fog striking the CORINTHIAN and throwing her crew into the water. Six of the crew members drowned and their survivors instituted suits under the Death on the High Seas Act. The owner of the CORINTHIAN sought exoneration from or limitation of liability and the court consolidated the actions for trial.

The CORINTHIAN carried a life preserver for each man stored in the crew members' bunks. On the forward deck of the vessel were boxes where four additional life preservers were stored. There were also two ring buoys on the deck of the vessel and the captain's life preserver in the pilot house. The claimants contended the CORINTHIAN was at fault in failing to have life preservers "readily accessible" within the meaning of 46 U.S.C.A. § 526e. The court, however, found no fault on the vessel and granted limitation of liability, explaining:

> I do not find that the Corinthian was at fault by reason of the location of the life preservers in the bunk of each seaman. The boat had provided each seaman with a life preserver, and they were as readily accessible from the bunks as they would have been from any other part of the boat at any given moment. I find nothing in the evidence to indicate that the members of the crew were

> compelled to keep the preservers in their bunks at all times. While it may be argued that at the moment of collision the men were on deck and the life preservers should have been there with them, it does not necessarily follow that the failure of the crew to carry their preservers on the deck was any fault on the part of the ship. The rules provide, 46 U.S.C.A. §526e, that the life preservers shall be 'so placed as to be readily accessible.' I find that the preservers were readily accessible within the meaning of the statute. **I cannot find that the ship's owner can be held to have anticipated that the Mormacfir would strike her at a point which prevented access below-deck. There was further no evidence to indicate that the supply of life preservers and ring buoys on the deck was exhausted.** There being no unseaworthiness on the part of the Corinthian, her petition for limitation of liability should be allowed. [emphasis added].[24]

In *Schlichter v. Port Arthur Towing Company*,[25] a seaman drowned when he fell overboard while relieving himself on the after deck near the starboard side of the vessel. At the time of the incident the vessel was moored to the dock of a chemical company in the Ouachita River at Sterlington, Louisiana. The decedent had been the sole crew member left aboard the vessel with responsibility for its safe keeping. He

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24. *Id.* at 371-372.

25. 288 F.2d 801 (5th Cir.), *cert. denied*, 368 U.S. 828, 82 S.Ct. 50, 7 L.Ed.2d 32 (1961).

locked the door to the compartment where the life preservers were stored such that when he fell overboard, his companions were unable to obtain a life jacket to throw to him.

The issue before the court was the sufficiency of the life saving gear on board and whether it was readily accessible in the event of an emergency. The court noted there were not less than a dozen life jackets aboard the vessel. The fact that they were not accessible was due to the decedent's own actions in locking the compartment. Importantly, the court noted **a total lack of any evidence to show that the availability of life jackets would have saved the decedent's life**. Where he was or where he might have been seen was not shown in any way by the evidence at trial. As the court explained "[f]or a life preserver to be effective, there must be a person within its reach or at least thought to be within the specific area where the preserver is to be thrown." *Id.* at 806.

In a similar vein, in *Tate v. C.G. Willis, Inc.*,[26] the decedent fell striking his head on the main deck of the barge

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26. 154 F.Supp. 402 (E.D.Va. 1957).

causing him to fall overboard between the barge and the dock. As the barge was an unmanned vessel, there were no life jackets aboard. However, life lines were available to be thrown to the decedent. The court stressed the need for a causal connection between the failure to use life saving equipment and the decedent's drowning:

> . . . **some reasonable inference of probable success in saving the life of the seaman must exist**. Even assuming that other things could have been done by the crew members in using life rings, life lines, or causing a member of the crew to jump overboard in the small space available, **there is no suggestion that any of these efforts would have assisted in saving the seaman's life**. [Emphasis added.][27]

If a vessel owner has a general duty to require nonswimming crew members to wear life preservers, such a duty would certainly have been recognized in *Derouen v. Vaughn Marine, Inc.*[28] The plaintiffs brought their action under the Jones Act and General Maritime Law for the drowning death of their son alleging that the vessel owner was negligent and/or the vessel was unseaworthy because the

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27. *Id.* at 410.

28. 529 F.2d 1222 (5th Cir. 1976).

crew members did not wear life jackets. The Court did not even address the issue of the duty to wear life jackets, affirming the jury's conclusion that there was no negligence on the part of the vessel owner. Surely, had there been such a duty, the Court would have reversed the jury's determination and remanded the case for further proceedings.

The cases in which employers have been held to a duty to require the use of life preservers involved either extremely inexperienced seamen placed in hazardous conditions or the dangerous transfer of a seaman from one vessel to another.[29] Neither of those conditions was present aboard the F/V NORTHUMBERLAND at the time of this accident. The F/V NORTHUMBERLAND was staffed with an experienced crew, which was required to wear ski belts while transferring from the steamer to the purse boats and from the purse boats back to the steamer, and there was no indication of a danger

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29. *Sadler v. Pennsylvania R. Co.*, 159 F.2d 784 (4th Cir. 1947); *Grantham v. Quinn Menhaden Fisheries, Inc.*, 344 F.2d 590 (4th Cir. 1965); *Davis v. Parkhill-Goodloe Company*, 302 F.2d 489 (5th Cir. 1962); *Deal v. A.P. Bell Fish Co.*, 674 F.2d 438 (5th Cir. 1982); and *Hebert v. Otto Candies, Inc.*, 402 F.Supp. 503 (E.D.La. 1975).

or hazard against which the crew should have been protected at the time of the accident.

There is clearly no general duty for a vessel owner, such as Zapata, to require the use of life preservers or other personal flotation devices in the circumstances present aboard the F/V NORTHUMBERLAND at the time of the accident.

CONCLUSION

The Fifth Circuit's opinion comports with the law of this Court and the other circuit courts. All are noticeably silent in the area advanced by Petitioners. As there is no conflict among the Circuits, there is no special and important reason for this Court to review the lower courts' holdings.

Moreover, under the unique factual circumstances presented herein, there is absolutely no justification for the fashioning of a newly-created duty on vessel owners to teach seamen to swim or to require the use of flotation devices at all times. Considering the violent forces at work when the F/V NORTHUMBERLAND was instantaneously consumed in fire, there was no evidence to indicate such measures would have prevented the drowning death of the badly burned and traumatized Jackson.

Where, as here, the vessel owner has exceeded regulatory requirements in safeguarding its crew and is met with a highly unusual and unforeseeable disaster, it is the party causing the disaster who should bear the full weight of responsibility for it. Petitioners are not left without recourse

by the opinions of the lower courts. Although the ship owner was exonerated, the guilty party, NGP, was held accountable and was available to satisfy Petitioners' damages.[30]

Accordingly, Zapata urges this Honorable Court to deny Petitioners' request for a writ of certiorari.

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30. Petitioners asserted a separate claim against NGP in the United States District Court for the Eastern District of Texas, Beaumont Division, which ended in a settlement of over $2 million in favor of Petitioners.

APPENDIX A

46 U.S.C. § 181, et seq.

CHAPTER 8 - LIMITATION OF VESSEL OWNER'S LIABILITY

Sec.

181. Liability of masters as carriers.

182. Loss by fire.

183 Amount of liability; loss of life or bodily injury; privity imputed to owner; "seagoing vessel."

183a. Repealed.

183b. Stipulations limiting time for filing claims and commencing suit.

183c. Stipulations limiting liability for negligence invalid.

184. Apportionment of compensation.

185. Petition for limitation of liability; deposit value of interest in court; transfer of interest to trustee.

186. Charterer may be deemed owner.

187. Remedies reserved.

188. Limitations of liability of owners applied to all vessels.

189. Limitation of liability of owners of vessels for debts.

190. Stipulations relieving from liability for negligence.

191. Stipulations relieving from exercise of due diligence in equipping vessels.

192. Limitation of liability for errors of navigation, dangers of the sea and acts of God.

193. Bills of lading to be issued; contents.

194. Penalties; lien; recovery.

195. Certain provisions inapplicable to transportation of live animals.

§ 181. Liability of Masters as Carriers

If any shipper of platina, gold, gold dust, silver, bullion, or other precious metals, coins, jewelry, bills of any bank or public body, diamonds, or other precious stones, or any gold or silver in a manufactured or unmanufactured state, watches, clocks, or timepieces of any description, trinkets, orders, notes, or securities for payment of money, stamps, maps, writings, title deeds, printings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with any other materials, furs, or lace, or any of them, contained in any parcel, or

package, or trunk, shall lade the same as freight or baggage, on any vessel, without at the time of such lading giving to the master, clerk, agent, or owner of such vessel receiving the same as written notice of the true character and value thereof, and having he same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner; nor shall any such master or owner be liable for any such goods beyond the value and according to the character thereof so notified and entered. R.S. § 4281.

§ 182. Loss by Fire

No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner. R.S. § 4282.

§ 183. Amount of Liability; loss of life or bodily injury; privity imputed to owner; "seagoing vessel"

(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

(b) In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) of this section is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than $420 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to $420 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased is sufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

(c) For the purpose of this section the tonnage of a seagoing steam or motor vessel shall be her gross tonnage without deduction on account of engine room, and the tonnage of a seagoing sailing vessel shall be her registered tonnage: *Provided*, That there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use.

(d) The owner of any such seagoing vessel shall be liable in respect of loss of life or bodily injury arising on distinct occasions to the same extent as if no other loss of life or bodily injury had arisen.

(e) In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel.

(f) As used in subsections (b), (c), (d) and (e) of this section and in § 183(b) of this title, the term "seagoing vessel" shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, nondescript self-propelled vessels, canal boats, scows, car floats,

barges, lighters, or nondescript non-self-propelled vessels, even though the same may be seagoing vessels within the meaning of such term as used in § 188 of this title. R.S. § 4283; August 29, 1935, c. 804, § 1, 49 Stat. 960; June 5, 1936, c. 521, § 1, 49 Stat. 1479.

§ 183a. Repealed. June 5, 1936, c. 521, § 5, 49 Stat. 1481.

§ 183b. Stipulations limiting time for filing claims and commencing suit

(a) It shall be unlawful for the manager, agent, master, or owner of any sea-going vessel (other than tugs, barges, fishing vessels, and their tenders) transporting passengers or merchandise or property from or between ports of the United States and foreign ports to provide by rule, contract, regulations, or otherwise a shorter period for giving notice of, or filing claims for loss of life or bodily injury, than six months, and for the institution of suits on such claims, than one year, such period for institution of suits to be computed from the day when the death or injury occurred.

(b) Failure to give such notice, where lawfully prescribed in such contract, shall not bar any such claim --

(1) If the owner or master of the vessel or his agent had knowledge of the injury, damage, or loss and the court determines that the owner has not been prejudiced by the failure to give such notice; nor

(2) If the court excuses such failure on the ground that for some satisfactory reason such notice could not be given; nor

(3) Unless objection to such failure is raised by the owner.

(c) If a person who is entitled to recover on any such claim is mentally incompetent or a minor, or if the action is one for wrongful death, any lawful limitation of time prescribed in such contract shall not be applicable so long as no legal representative has been appointed for such incompetent, minor, or decedent's estate, but shall be applicable from the date of the appointment of such legal representative; *Provided, however,* That such appointment be made within three years after the date of such death or injury. R.S. § 4283A, as added August 29, 1935, c. 804, § 3, 49, Stat. 960.

§ 183c. Stipulations limiting liability for negligence invalid

It shall be unlawful for the manager, agent, master, or owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner, master, or agent from liability, or from liability beyond any stipulated amount, for such loss or injury, or (2) purporting in such event to lessen, weaken, or avoid the right of any claimant to a trial by any court of competent jurisdiction on the question of liability for such loss or injury, or the measure or damages therefor. All such provisions or limitations contained in any such rule, regulation, contract, or agreement are declared to be against public policy and shall be null and void and of no effect. (As amended November 4, 1992, Pub.L. 102-587, Title III, § 3006, 106 Stat. 5068.)

§ 184. Apportionment of compensation

Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares,

merchandise, or any property whatever, on the same voyage, and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel, in proportion to their respective losses; and for that purpose the freighters and owners of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto. R.S. § 4284; February 27, 1877, c. 69, § 1, 19 Stat. 251.

§ 185. Petition for limitation of liability; deposit of value of interest in court; transfer of interest to trustee

The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security

therefor, as the court may from time to time fix as necessary to carry out the provisions of § 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of § 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease. R.S. § 4285; June 5, 1936, c. 521, § 3, 49 Stat. 1480.

§ 186. Charterer may be deemed owner

The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof. R.S. § 4286.

§ 187. Remedies reserved

Nothing in sections 182, 183, 184, 185 and 186 of this title shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers, or seamen, for or on account of any embezzlement, injury, loss, or destruction of merchandise, or property, put on board any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel. R.S. § 4287.

§ 188. Limitation of liability of owners applied to all vessels

Except as otherwise specifically provided therein, the provisions of sections 182, 183, 183b-187 and 189 of this title shall apply to all seagoing vessels, and also to all vessels used on lakes or rivers or inland navigation, including canal boats, barges, and lighters. R.S. § 4289; February 18, 1875, c. 80, § 1, 18 Stat. 320; June 19, 1886, c. 421, § 4, 24 Stat. 80; June 5, 1936, c. 521, § 4, 49 Stat. 1481.

§ 189. Limitation of liability of owners of vessels for debts

The individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending: *Provided*, That this provision shall not prevent any claimant from joining all the owners in once action; nor shall the same apply to wages due to persons employed by said shipowners. June 26, 1884, c. 121, § 18, 23 Stat. 57.

§ 190. Stipulations relieving from liability for negligence

It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising out from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge.

Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect. February 13, 1893, c. 105, § 1, 27 Stat. 445.

§ 191. Stipulations relieving from exercise of due diligence in equipping vessels

It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence[1] properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided. February 13, 1893, c. 105, § 2, 27 Stat. 445.

1. Probably should read "to."

§ 192. Limitation of liability for errors of navigation, danger of the sea and acts of God

If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master by held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service. February 13, 1893, c. 105, § 3, 27 Stat. 445.

§ 193. Bills of lading to be issue; contents

It shall be the duty of the owner or owners, masters, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described. February 13, 1893, c. 105, § 4, 27 Stat. 445.

§ 194. Penalties; lien; recovery

For violation of any of the provisions of sections 190-193 of this title the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading provided for, shall be liable to a fine not exceeding $2,000 00. The amount of the fine and costs for such violation shall be a lien upon

the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the Government of the United States. February 13, 1893, c. 105, § 5, 27 Stat. 446.

§ 195. Certain provisions inapplicable to transportation of live animals

Sections 190 and 193 of this title shall not apply to the transportation of live animals. February 13, 1893, c. 105, § 7, 27 Stat. 446.

§ 196. Certain law unaffected

Sections 190-195 of this title shall not be held to modify or repeal sections 181, 182, and 183 of this title, or any other statute defining the liability of vessels, their owners, or representatives. February 13, 1893, c. 105, § 6, 27 Stat. 446.

APPENDIX B

46 U.S.C. § 688

§ 688. Recovery for injury to or death of seaman

(a) Application of railway employee statute; jurisdiction

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b) Limitation for certain aliens; applicability in lieu of other remedy

(1) No action may be maintained under subsection (a) of this section or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action if the incident occurred --

> (A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of off-shore mineral or energy resources -- including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing,or transporting supplies, equipment or personnel, but not including transporting those resources by a vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and
>
> (B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possession. As used in this paragraph, the term "continental shelf" has the meaning stated in article I of the 1958 Convention in the Continental Shelf.

(2) The provisions of paragraph (1) of this subsection shall not applicable if the person bringing the action establishes that no remedy was available to that person --

> (A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or

(B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

(As amended December 29, 1982, Pub.L. 97-389, Title V, § 503(a), 96 Stat. 1955.)

APPENDIX C

POSTMORTEM EXAMINATION REPORT

S.M. Le Ber, M.D.
Pathologist

5840 Monroe Street
Groves, Texas 77619

NAME: JACKSON, Charles, Jr. AGE: 53 SEX: M. RACE: Black

DATE AND TIME OF DEATH: 10-3-89 - 1745 AUTOPSY NO. MEA-89-105

PLACE OF DEATH: Five miles S.W. of Sabine Pass, 1 mile offshore

DATE AND TIME OF AUTOPSY: 10-5-89 - 0745

PLACE OF AUTOPSY: Clayron-Thompson Funeral Home, Groves, Texas 77619

AUTHORIZATION FOR AUTOPSY: Judge A.E. Halter

PROSECTOR: S.M. Le Ber, M.D.

ANATOMIC DIAGNOSIS

IMMEDIATE CAUSE OF DEATH:	SUBMERGED GASLINE EXPLOSION
MANNER OF DEATH:	ACCIDENTAL
MECHANISM OF DEATH:	DROWNING BY SUBMERSION
ADDITIONAL DIAGNOSES:	ASPIRATION OF STOMACH CONTENTS INTO LUNGS ACUTE HYPEREMIA OF LUNGS ACUTE PULMONARY EDEMA OF LUNGS

FLASH-BURNS OVER FRONT & BACK
OF BODY
BODY # 3 (DESIGNATED)

/S/

S.M. Le Ber, M.D.

SML:ms

PRELIMINARY NOTE: The deceased was a 53-year old black male who was named as Second Mate on the motor, fishing vessel, NORTHUMBERLAND which was apparently fishing in the Gulf of Mexico waters, approximately five miles southwest of Sabine pass, approximately half to one mile offshore, on October 3, 1989 at approximately 1745, when the vessel allegedly struck a submerged Gas Pipeline, rupturing it. Almost immediately there was an explosion, and fire enveloped the ship. The deceased was either thrown or jumped overboard. The exact time of the recovery of his body was not known, but the body, when it surfaced, was taken by local ambulance to Clayron-Thompson Funeral Home in Groves, Texas, where an autopsy was requested by Judge A.E. Halter, and was performed on the unembalmed body on October 5, 1989 at 0800.

EXTERNAL EXAMINATION: The body was that of a well developed, well nourished, adult black male. The body had no clothing on it when delivered. The body was 75 inches in length and his weight was estimated to be 195 pounds.

He had short, black hair, mustache and chin whiskers. The superficial body skin was denuded over the front and back, representing approximately 90% loss.

There was a 1½ inch healed scar on the right forehead, and a 1½ inch similar, healed scar, over the lateral aspect of the right biceps area.

Two teeth were missing, the right, upper lateral incisor, (#7), and the left upper central incisor (#9). The rest of the dentition was intact, and no restorations were noted.

The body was relatively well preserved and showed no evidence of tissue destruction due to marine life.

No other significant external findings were noted.

INTERNAL EXAMINATION: The body was opened through a high-Y incision, the incision being extended to the superior border

of the symphysis pubis. The skin flaps were reflected and the sternum was removed in the usual manner. The organs were in their normal position. The organs were removed en bloc from the sublaryngeal area to the anus for definitive dissection. At this time, a blood sample was taken and labeled with the autopsy number, MEA-89-105, and #3 which was designated as the third body to be delivered to Mr. Gerrit J. Walhout, of the National Transportation Safety Board for Toxicology.

CARDIOVASCULAR SYSTEM: The heart was free within the pericardial sac and was normal in size and shape. The coronary arteries were patent and there was no evidence of recent or remote myocardial infarction. The valves and cusps were normal. The aorta demonstrated minimal atherosclerosis.

RESPIRATORY SYSTEM: There were no pleural adhesions. The tracheobronchial tree contained small quantities of stomach contents. There was no evidence of neoplastic disease and the cut surfaces demonstrated acute pulmonary edema and hyperemia.

LIVER: The liver was normal in size and gross appearance. It was

uniform throughout and no lesions were present. The gallbladder contained a small amount of amber bile. No stones were present.

PANCREAS: The pancreas was normal in size and shape and demonstrated a normal, creamy-tan lobular architecture. No lesions were present.

SPLEEN: The spleen was normal in size, shape and appearance. No lesions were present.

ADRENAL GLANDS: Both glands were identified and they showed no significant postmortem changes. No lesions were present.

KIDNEYS: Both kidneys were normal in size, shape and appearance. The capsules stripped with ease to reveal a smooth cortex. The cut surfaces showed normal markings and no significant increase in peripelvic fat. The kidney parenchyma demonstrated uniform hyperemia. The ureters were normal. The urinary bladder contained no urine and the mucosa was normal.

GASTROINTESTINAL SYSTEM: The esophagus contained small particles of stomach contents and the stomach contained

about one pint of fluid and partially digested food. There was no evidence of mucosal ulceration. The small and large intestines were normal and the appendix was normal.

CENTRAL NERVOUS SYSTEM: No internal examination of the head was made.

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SUMMARY: The deceased was a 53 year old black male who was identified as Charles Jackson, Jr. by fingerprints and a photo.

The immediate cause of death was due to the Explosion and Fire resulting from the rupture of a submerged gas pipeline. The manner of death is deemed to have been Accidental and the Mechanism of death was due to Drowning by Submersion.

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